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No. 75-1709

In the Supreme Court of the United States

OCTOBER TERM, 1976

RAY ELBERT PARKER, PETITIONER

v.

DANIEL J. BOORSTIN, LIBRARIAN OF CONGRESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner has been employed by the Copyright Office of the Library of Congress since 1967. Although he rose from grade GS-7 to GS-11 by 1970, he has received no further grade promotions since that time. Petitioner instituted these five suits in the United States District Court for the District of Columbia against the Librarian of Congress, his subordinates, and the heads of other federal agencies.[1] Each of the suits essentially complained of petitioner's failure to advance to a GS-12 position in the Copyright Office. Each action was dismissed by the district court (Pet. App. 1b-7b). The suits were consolidated on appeal, and the court of appeals summarily affirmed (Pet. App. 2a).

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[1]Petitioner has filed at least twelve similar suits in the United States District Court for the District of Columbia since 1972.

1. In Nos. 75-301 and 74-370 in the district court (court of appeals Nos. 75-1628 and 75-1708) petitioner, a white male, alleged that he had not been promoted to GS-12 as the result of reverse racial discrimination. By the affidavit of the Coordinator of the Equal Opportunity Program of the Library of Congress (Affidavit of Thomas C. Brackeen, Coordinator, Equal Opportunity Program, Library of Congress, filed May 6, 1974, as Exhibit 2 to Defendants' Motion to Dismiss in No. 74-370), the government demonstrated that petitioner had never filed an employment discrimination complaint with the Library. The district court duly dismissed the complaints for failure to exhaust administrative remedies (Pet. App. 5b, 7b).

Section 717(c) of the Civil Rights Act of 1964, as added by the Equal Employment Opportunity Act of 1972, 86 Stat. 111, 42 U.S.C. (Supp. IV) 2000e-16(c), established the exclusive administrative and judicial enforcement system for redress of federal employment discrimination complaints. See *Brown* v. *General Services Administration*, No. 74-768, decided June 1, 1976. It provides that an aggrieved employee of specified federal agencies, including the Library of Congress (42 U.S.C. (Supp. IV) 2000e-16(a)), may file suit in federal district court to seek review of a complaint of discrimination based on race, color, religion, sex, or national origin "[w]ithin thirty days of receipt of notice of final action taken by [the employing federal agency] or by the Civil Service Commission upon an appeal from a decision or order of such * * * unit" upon such a complaint. Petitioner never submitted a reverse racial discrimination claim to the Library of Congress, and thus there is no final agency action subject to judicial review. Therefore, petitioner has failed to exhaust administrative remedies as required before obtaining judicial review of such a discrimination complaint under Section 717(c). *Brown* v. *General Services Administration, supra.* Accordingly, the courts below correctly determined that they lacked subject matter jurisdiction to entertain petitioner's complaints at this time.

2. In Nos. 75-643 and 75-1078 in the district court (court of appeals Nos. 75-1953 and 75-1954), petitioner alleged that the Library of Congress was altering the structure of its job positions and classifications without giving affected employees notice or opportunity to appeal to the Civil Service Commission, and that the Library had downgraded or reassigned certain newly-opened positions for the purpose of by-passing certain qualified personnel, including himself. He sought, *inter alia*, to require the Commission to hear his complaint and to enjoin the Library from implementing "job position" changes until a series of notices, hearings, and meetings were held.

The government demonstrated that the Library of Congress and the Civil Service Commission repeatedly had attempted to explain to petitioner the kinds of employment grievances that are cognizable under their regulations and the procedures for instituting such proceedings (Letter of Dallas A. Gilbertson, Acting Chief, Advisory Services Division, Civil Service Commission, to petitioner, dated May 13, 1975, filed on June 11, 1975, as Exhibit 2 to Defendants' Motion to Dismiss the Action or, in the Alternative, for Summary Judgment in No. 75-643). Petitioner never properly filed a complaint with the Civil Service Commission seeking review of his present job classification. His complaints with respect to the contemplated reorganization of the Examining Division of the Copyright Office were premature, because at the time these suits were filed, no reorganization plan had been submitted, and petitioner's job classification and duties remained unchanged (Affidavit of Ronald F. Buttry, Supervisory Placement and Classification Specialist,

Library of Congress, filed on June 11, 1975, as Exhibit 1 to Defendants' Motion to Dismiss the Action or, in the Alternative, for Summary Judgment in No. 75-643). The government also showed that petitioner had never pursued his administrative remedies to obtain a final determination by the Library of his complaints concerning his failure to be appointed to various postings (Affidavit of Hobart D. Johnston, Employee Relations Specialist, Employee Relations Office, Library of Congress, filed on July 24, 1975, as Exhibit 1 to Defendants' Motion to Dismiss in No. 75-1078). The district court therefore properly dismissed these actions for failure to exhaust administrative remedies (Pet. App. 3b-4b).

3. In No. 75-1085 (court of appeals No. 75-2160), petitioner filed a petition for a writ of mandamus seeking to compel the General Accounting Office to conduct an extensive audit of the Copyright Office. The government submitted an affidavit to the district court that refuted petitioner's contentions (Pet. 8-9) that the General Accounting Office had failed to perform an audit of the Library of Congress or had been denied access to the Library's fiscal records (Affidavit of Donald C. Curran, Chief of the Financial Management Office, Library of Congress, filed September 24, 1975, as Exhibit 1 to Defendants' Motion to Dismiss in No. 75-1085). The district court dismissed the petition (Pet. App. 1b-2b).

The Comptroller General has no ministerial or nondiscretionary duty to audit the Copyright Office of the Library of Congress. Therefore, mandamus will not lie to require him to perform that act. See *Carter* v. *Seamans*, 411 F. 2d 767 (C.A. 5), certiorari denied, 397 U.S. 941; *United States ex rel. L. Margulies & Sons, Inc.* v. *McCarl*, 10 F. 2d 1012 (C.A. D.C.), certiorari denied, 273 U.S. 696. Nor has petitioner shown that he otherwise lacks an adequate remedy to obtain the relief he seeks.

See *Kerr* v. *United States District Court*, No. 74-1023, decided June 14, 1976. Pursuit of his administrative remedies, rather than the repeated filing of premature suits in the district court, would provide a full and fair opportunity to explore any legitimate complaint he may have concerning his failure of promotion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.